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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Definition of Markets for Purposes of the)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

DOCKET FILE 0

To: The Commission

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COMMENTS OF DIVERSIFIED COMMUNICATIONS

Diversified Communications ("Diversified"), licensee of television broadcast Stations WABI-TV, Bangor, Maine, WYOU-TV, Scranton, Pennsylvania, WPDE-TV, Florence, South Carolina, and WCJB-TV, Gainesville, Florida, hereby submits its comments addressing the issues relating to proposed redefinition of markets raised in the *Notice of Proposed Rule Making* ("NPRM") in the above-referenced proceeding, released December 8, 1995. For the reasons set forth below, Diversified supports the adoption of a rule which provides for the substitution of Nielson Designated Market Areas ("DMAs") for Arbitron Areas of Dominant Influence ("ADIs"), provided the Commission also retains market changes that have been granted to a station in a particular geographic area through the current Section 614(h) modification process, as such retention is necessary to avoid the administrative burdens that would result from requiring those ADI modifications to be reheard by the Commission in light of a change in market definitions to Nielson DMAs. Furthermore, Diversified supports the retention of a general review and refinement process similar to the current Section 614(h) modification process that will allow for alterations in market boundaries as needed to reflect changes in viewing patterns and other relevant factors.

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A. **Background.**

Under Section 614(h) of the Communications Act¹ and implementing rules adopted by the Commission thereafter,² a commercial television station is entitled to assert must-carry rights on cable systems located within the station's market. By the terms of Section 614(h)(1)(C), a station's market is determined by Section 73.3555(e)(3)(I) of the Commission's rules, 47 C.F.R. § 73.3555(e)(3)(I), which is a separate rule dealing with broadcast station ownership issues that refers to Arbitron ADIs.³ An ADI is a geographic market designation, usually a county, portion of a county or group of counties, that defines a television market based on measured viewing patterns.

In addition to determining must-carry rights of television broadcast stations, market definitions are also cross referenced and incorporated in the Copyright Act,⁴ and thus, have varying copyright fee consequences for television stations and cable systems, depending on whether the station is considered "local" or "distant" with respect to a particular cable system. A broadcast signal is "local" for copyright fee purposes if the station meets the requirements of Section 76.55(e) of the Commission's rules, 47 C.F.R. § 76.55(e), which provides, *inter alia*, that:

"(1) a local commercial broadcast television station's market shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in its Television

¹ Section 614 of the Communications Act was added in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

² *Report and Order in MM Docket 92-259*, 8 FCC Rcd 2965, 2976-2977 (1993).

³ *NPRM* at ¶2.

⁴ 17 U.S.C. § 111(f) (definition of "local service area of a primary transmitter").

ADI Market Guide or any successor publication,...except that for areas outside the contiguous 48 states, the areas of dominant influence may be defined using Nielson's Designated Market Area, where applicable..."

Since 1993, and every three years thereafter, a broadcaster must elect either must-carry status, which allows the broadcaster to insist on cable carriage in its local market area, or retransmission consent, which permits broadcasters and cable operators to negotiate cable carriage arrangements individually. The next election must be made by October 1, 1996.⁵

Although Arbitron ADIs generally define the area in which a station can assert its must-carry rights with respect to a particular cable system, Section 614(h) of the Communications Act also directs the Commission to consider individual requests for changes in ADIs "with respect to a particular television broadcast station, [to] include additional communities within the television market or exclude communities from [that same] market to better effectuate the purposes of this section."

B. The NPRM Seeks Comment on Three Options that Could Be Used to Define a Market for Purposes of Mandatory Cable Carriage of Television Stations.

On or around December 31, 1993, Arbitron, which is a private company, ceased designation and publication of ADI market areas, leaving the Commission to decide the issue of what should define a television market in future must-carry election periods and for related issues for which market definitions play a critical role in the absence of updated Arbitron ADIs. In the *NPRM*, the Commission suggests that it will choose one of three options when revising the definition of a market. First, the Commission suggests that it could substitute Nielson DMAs for Arbitron ADIs, which would lead to some minimal market boundary changes, but "appear to

⁵ *NPRM* at ¶4, citing 47 C.F.R. § 76.64(f)(2).

have been intended to serve roughly the same purposes in the sales of broadcast station advertising time and programming.”⁶

Secondly, the Commission proposes that it could continue to use Arbitron’s 1991-92 *Television ADI Market Guide* to define market areas, subject to individual review and refinement through the Section 614(h) process. The Commission expressly favors this option, because, it asserts, *inter alia*, that it provides stability in the must-carry process and would avoid the “questions [raised] as to the numerous cases which have already been processed under Section 614(h) revising market areas with respect to particular stations and particular communities.”⁷ The Commission’s third suggestion is to retain the existing market definitions for the 1996 election period and switch to a Nielson-based standard thereafter, presumably to allow more time for stations and other interested parties to adjust to the revised markets.⁸

C. **The Commission Should Adopt a Definition of a Television Market Which Substitutes Nielson DMAs for Arbitron ADIs.**

In the *NPRM* initiating this proceeding, the Commission states that it would prefer to retain the current use of the 1991-92 Arbitron markets, as modified since that time through the Section 614(h) process, in order to provide stability in the television broadcast signal carriage process.⁹ Adoption of such an approach would foster the use of outdated, impractical and generally unused statistical information. Since Arbitron ceased determination and publication of

⁶ *NPRM* at ¶6.

⁷ *NPRM* at ¶7.

⁸ *NPRM* at ¶6.

⁹ *NPRM* at ¶7.

television markets on or around December 31, 1993, the broadcast industry has generally used Nielson DMAs and other market statistics published by Nielson to gauge viewing patterns for individual stations across the country. Just as Arbitron ADIs were previously altered every year, so too are Nielson statistics updated and DMA boundary modifications routinely made in order to reflect measured changes in viewing patterns in a given area. For this reason, Nielson DMAs are the most reliable and current television market areas available for use by the broadcast industry.

Presumably because the must-carry and other rules relating to television markets were adopted before Arbitron ceased its ratings operations, and because the must-carry election periods run three years, the FCC has not followed this widespread industry practice toward the use of Nielson DMAs. Yet there is no logical reason why the Commission should purposefully avoid using this updated geographic and viewing information in order to mandate the retention of a standard that is used less and less frequently in actual industry practice. To not adopt use of the updated Nielson DMAs is essentially to *invite* administrative burdens in that many broadcast licensees will be required to file Section 614(h) special relief appeals to protest the retention of ADI boundaries that are over five years old and do not reflect the current viewing patterns of a given geographic area.

Merely because the Commission has not for whatever reason made such an overdue change in the past is no reason for it not to adopt such a change at this time to reflect the current industry trend, even in light of the “instability” that it alleges such a change might cause. In fact, because the overwhelming majority of non-regulatory transactions in the broadcast industry are made on the basis of Nielson DMAs, not Arbitron ADIs, any inconvenience that might result

from the substitution of DMAs for ADIs in the Commission's rules would likely be felt primarily by the Commission itself. The change would be otherwise consistent with current general industry practices.

The adoption of a rule which would postpone the regulatory change to Nielson DMAs until after the 1996 must-carry election is unwarranted and unnecessary. Because the industry is substantially using DMAs in the ordinary course of running its broadcast stations, licensees do not need a three-and-a-half year adjustment period in which to move to the Nielson standard in the context of Commission regulation. The Commission should not delay what is already an overdue regulatory change based on the possible inconvenience that might be caused to the agency in the process of implementing a change that will nonetheless, under the FCC's third proposal, eventually be adopted. If there are resulting inconveniences, they will not be substantially eliminated, if at all, by simply waiting three years. Therefore, a regulatory change to the use of Nielson DMAs in the definition of a television station's local market should be promptly adopted.

D. **The Commission Should Retain the Modifications in Geographic Market Boundaries That Have Already Been Resolved Through the Section 614 Process and Allow Further Future Market Modifications on an Individual Request Basis.**

It is logical that, in the event that the Commission adopts a rule which continues to use Arbitron's 1991-92 ADI markets to define market areas, modifications to television markets that have been implemented through the Section 614(h) process should be retained as well. It would not make sense for the Commission to rehear those cases at this time.

However, if Nielson DMAs are eventually substituted for Arbitron ADIs, now or at some point in the future, those Section 614(h) modifications to existing television markets should still

be retained to the extent that the modified boundaries are inconsistent with the revised markets based on Nielson DMAs. Such a practice would avoid the rehearing of essentially the same arguments as have already been substantially presented and decided upon by the FCC, and would thus preserve the resources of both the Commission and other interested parties.

For example, where the Commission has modified a station's ADI to include an adjacent county that was not originally located in the ADI for whatever reason, if the Nielson DMA has roughly the same boundary as the Arbitron ADI, the licensee should not have to appeal to the Commission to add the county again. The same documentation, data and arguments as were used the first time would only be presented again, an unnecessary and time-consuming administrative requirement for all parties concerned. Presumably, assuming the Commission's decision was based on sound reasoning during the initial Section 614(h) proceeding, the subsequent decision should not produce a different outcome merely because the rules in the second proceeding refer to DMAs instead of ADIs.

Additionally, if the Commission adopts a rule which uses Nielson DMAs, whether for the 1996 must-carry election or for all elections thereafter, it should make that designation subject to the similar individual review and refinement that is already currently in place through the Section 614(h) process. This will ensure that individual stations, communities and other interested parties are not unduly harmed by designated boundaries which do not accurately reflect the viewing patterns of or other relevant factors in a given geographic area.

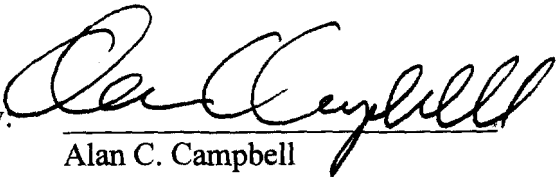
E. **Conclusion.**

For the above reasons, Diversified supports the adoption of a definition of a television market which substitutes Nielson DMAs for Arbitron ADIs. That change should become

effective in time for stations to use the information in making their next must-carry elections on October 6, 1996, to ensure that current information is used to determine mandatory carriage of stations through the 1999 election period and beyond. Furthermore, whatever revised market definition is adopted should retain certain changes in geographic boundaries that have already been decided by the Commission under the current Section 614(h) process, to the extent that those changes are inconsistent with Nielson DMA boundaries, and should generally be subject to individual review and refinement through a process similar to the existing Section 614(h) special relief process.

Respectfully submitted,

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